7 *Exhibit A to petition*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington.

Miss SUSAN DWIGHT BLISS
(% Price, Waterhouse and Company),
56 Pine Street, New York, New York.

MADAM: You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $1,909.31 as shown in the statement attached.

8 In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.

By (Sgd.) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

9 Statement

IT:AR:A-1
MH-60D

In re: Miss Susan Dwight Bliss, % Price, Waterhouse and Company, 56 Pine Street, New York

Tax liability

Year	*Tax liability*	*Tax assessed*	*Deficiency*
1928	$64,290.84	$62,381.53	$1,909.31

The report of the internal revenue agent in charge at 250 West 57th Street, New York, New York, has been reviewed in connection with your protest dated November 23, 1929, and the report of the internal revenue agent in charge at 17 Battery Place, New York, New York, covering an examination of the books of account and records of the George T. Bliss Agency Account, % United States Trust Company of New York, 45 Wall Street, New York, New York, for the year 1928.

The dividends received from the Great Northern Iron Ore Company are held to be 35.71% taxable.

Net income reported on return:			
Ordinary net income			$226,241.49
Capital net gain			$207,850.82
Capital net gain as corrected			220,305.79
Increase			$ 12,454.97
10 Ordinary net income			$226,241.49
Add:			
1. Other income from George T. Bliss Agency account	$1,508.89		
2. Dividends received from the Great Northern Iron Ore Co	253.36		
			1,762.25
Adjusted net income			$228,003.74

Computation of tax

Adjusted net income		$228,003.74
Less:		
Dividends	$270,273.15	
Personal exemption	1,500.00	
		271,773.15
Income subject to normal tax		None
Surtax on $228,003.74		$ 37,260.75
Tax at 12½% on capital net gain of $220,305.79		27,538.22
Total tax		$ 64,798.97
Less:		
Tax paid at source		508.13
Tax assessable		$ 64,290.84
Tax previously assessed		62,381.53
Deficiency		$ 1,909.31

11

Explanation of changes

1. Income from the George T. Bliss Agency account has been increased by $1,508.89 as fully explained by the revenue agent.

2. Dividends received from the Great Northern Iron Ore Company, which are held to be 35.71% taxable, have been included in the total income.

3. The amount of $12,454.97 claimed for loss on the sale of stock of the Quincy Mining Company has been disallowed, for the reason that information on file in this office discloses that no loss was incurred on the sale in the year 1928.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1928, the Bureau will be unable to afford you an opportunity under the provisions of article 1211 of Regulations 69 and/or article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

12 Before United States Board of Tax Appeals

[Title omitted.]

Amended petition (no. 58391)

Filed Oct. 23, 1931

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue (respondent herein) in his notice of deficiency (IT:AR:A–1–MH–60D) dated March 10, 1931, and as a basis of the proceeding alleges as follows:

1. The petitioner is a resident citizen of the United States whose address is % Price, Waterhouse & Co., 56 Pine Street, New York, N. Y.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 10, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928, in the amount of $1,909.31.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

13 (a) The respondent has failed to allow as a deduction in the computation of taxable income received by the petitioner from the George T. Bliss Agency account, $1,508.89 representing a part of the fees paid to the trustees.

(b) The respondent has failed to allow as a deduction in the computation of capital net gain, $12,454.97 loss on the sale of capital stock of Quincy Mining Company.

(c) The respondent has failed to allow as a deduction in the computation of taxable income of the petitioner, the loss of $5,000.00 on investment in the capital stock of Stevenson & Cameron, Inc.

5. The facts upon which the petitioner relies as the basis of its appeal are as follows:

(a) For the calendar year 1928, the petitioner filed Federal income-tax return on or before March 15, 1929, on the basis of cash receipt and disbursements and the respondent has computed the tax liability of the petitioner on the same basis.

(b) In the tax return filed by the petitioner, her taxable income from the George T. Bliss Agency trust was included in the entire

amount either distributed or distributable to her. In the Treasury Department letter the amount of $1,508.89 has been added as representing a proportionate reduction of allowable deductions to the trust on account of fees paid to the trustees.

(c) In the appeal of Grace M. Knox et al., Executors of the
14 Estate of Seymour H. Knox (3 B.T.A. 143), it was held that such compensation to executor and trustees is one of the ordinary and necessary expenses of the estate and properly deductible *without regard to the fact that a portion of the estate's income is exempt from taxation.* [Italics supplied.]

(d) During the calendar year 1928, the petitioner sold capital stock of the Quincy Mining Company for $10,045.03 which at the date of receipt on October 30, 1918, had a cost or base of $22,500.00 resulting in capital loss of $12,454.97.

(e) The respondent has failed to allow as a deduction in the computation of capital net gain the loss of $12,454.97, set forth in paragraph (d) above.

(f) The petitioner invested $5,000.00 in the capital stock of Stevenson & Cameron, Inc. The capital stock of that company became worthless during the calendar year 1928 and the petitioner thereby sustained a loss on her investment of $5,000.00.

(g) The respondent has failed to allow as a deduction in the computation of taxable income, the loss of $5,000.00 set forth in paragraph (f) above.

WHEREFORE the petitioner prays that this Board may hear the proceeding and find that taxable income as computed by the respondent in his notice of deficiency is overstated by $18,963.86
15 and that there is an over-assessment of taxes for the calendar year 1928, in the amount of $949.34.

(Sgd.) DONALD ARTHUR,
Agent for Petitioner.
56 Pine Street, New York, N.Y.

AUGUST 13, 1931.

[*Duly sworn to by Susan Dwight Bliss, jurat omitted in printing.*]

16 [Exhibit A to amended petition (no. 58391) omitted. Printed side page 7 ante.]

17–19 [Omitted.]

20 Before United States Board of Tax Appeals

[Title omitted.]

Amended answer to amended petition (no. 58391)

FILED SEPT. 12, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for amended

21 answer to the amended petition of the above-named taxpayer, admits, denies, and avers as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies that he erred in determining the tax set forth in said notice of deficiency, and further denies that he erred as alleged in paragraphs 4 (a), 4 (b), and 4 (c) of the amended petition.

(d) Avers that the deficiency asserted in the notice of deficiency is understated by reason of the allowance of deductions for contributions in excess of 15% of the petitioner's "ordinary net income" before deducting contributions. Avers that in the event the Board determines that the petitioner's "ordinary net income" is less than the amount found by the Commissioner, the deductions for contributions should be limited to 15% of the "ordinary net income" before deducting contributions regardless of the amount thereof.

5. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5(a) to 5 (g) inclusive of the amended petition, and therefore denies the same.

6. The Commissioner relies on the following facts in support of the error assigned in subparagraph (d) of paragraph 4 hereof.

22 (a) In the notice of deficiency, the respondent determined that the petitioner's "ordinary net income" before deducting contributions was the sum of $270,490.77 and that petitioner had capital net gain in the amount of $220,305.79.

(b) In determining the "ordinary net income" set forth in the notice of deficiency in the amount of $228,003.74, the Commissioner made an allowance of $43,995.92, representing contributions claimed by petitioner.

Denies generally and specifically each and every material allegation contained in taxpayer's amended petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST,
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
C. C. HOLMES,
Special Attorney,
Bureau of Internal Revenue.

k 9-2-32.

23 Before United States Board of Tax Appeals

[Title omitted.]

Petition (*no. 60709*)

Dec. 1, 1931

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue (respondent herein) in his notice of deficiency (IT:AR:A–2–MMB–60D), dated October 31, 1931, and as a basis of the proceeding alleges as follows:

1. The petitioner is a resident citizen of the United States whose address is % Price, Waterhouse & Co., 56 Pine Street, New York, N.Y.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on October 31, 1931.

3. The taxes in controversy are income taxes for the calendar year 1929, in the amount of $1,009.41.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

24 (a) In the computation of taxable income, the respondent has failed to allow as a deduction the $1,922.03 commissions paid on the collection of income.

(b) In the computation of taxable income, the respondent has failed to allow as a deduction $5,000.00 representing a loss on stock of Stevenson & Cameron, Inc.

5. The facts upon which the petitioner relies as the basis of her appeal are as follows:

a. For the calendar year 1929 the petitioner filed Federal income-tax return on or before March 15, 1930, on the basis of cash receipts and disbursements and the respondent has computed the tax liability of the petitioner on the same basis.

b. In the tax return filed by the petitioner, her taxable income from the George T. Bliss Agency trust was included in the entire amount, either distributed or distributable to her. In the Treasury Department letter taxable income has been increased by $1,653.93, representing fees paid to the trustees.

c. The taxpayer paid $268.10 commisisons on income collected by her agent. The Commissioner has disallowed this amount as a deduction.

d. In the appeal of Grace M. Knox et al., Executors of the Estate of Seymour H. Knox (3 B.T.A. 143), it was held that such compensation to executors and trustees is "one of the

37 ordinary and necessary expenses of the estate and properly deductible *without regard to the fact that a portion of the estate's income is exempt from taxation.*" [Italics supplied.]

e. The petitioner invested $5,000.00 in the capital stock of Stevenson & Cameron, Inc. The capital stock of that company became worthless during the calendar year 1929 and the petitioner thereby sustained a loss on her investment of $5,000.00.

Wherefore, the petitioner prays that this Board may hear the proceeding and find that taxable income as computed by the respondent in his notice of deficiency is overstated by $6,922.03 and that there is an overassessment in tax of $375.00 for the year 1929.

Respectfully submitted.

(Sgd.) DONALD ARTHUR,
Agent for Petitioner,
56 Pine Street, New York, N.Y.

NOVEMBER 20, 1931.

[*Duly sworn to by Susan Dwight Bliss, jurat omitted in printing.*]

Exhibit A to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Oct. 31, 1931.

MISS SUSAN DWIGHT BLISS
(% Price, Waterhouse and Company),
56 Pine Street, New York, New York.

MADAM: You are advised that the determination of your tax liability for the year 1929 discloses a deficiency of $1,009.41 as shown in the statement attached.

27 In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By (Sgd.) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

28 Statement

IT:AR:A-2
MMB-60D

In re: Miss Susan Dwight Bliss, % Price, Waterhouse and Company, 56 Pine Street, New York, New York

Tax liability

Year	*Tax liability*	*Tax assessed*	*Deficiency*
1929	$71,777.28	$70,767.87	$1,009.41

The report of the internal revenue agent in charge at 17 Battery Place, New York, New York, has been reviewed and approved by this office.

Computation of income

Ordinary net income reported on return		$213,483.37
Plus:		
a. Increase in fiduciary income	$1,653.93	
b. Increase in dividends	737.37	
c. Other deductions disallowed	268.10	
	$2,659.40	
Less:		
d. Profit on securities reduced	737.37	
		1,922.03
Ordinary net income adjusted		$215,405.40
29 Capital net gain reported on return	$294,942.31	
Plus:		
e. Increase in capital net gain	5,000.00	
		299,942.31
Total adjusted net income		$515,347.71

Explanation of adjustments

a. Income received from the Estate of George T. Bliss has been increased due to the disallowance as a deduction on the estate return, *commission paid on the collection of nontaxable income.*

b and d. Loss on the sale of 548 rights of Chicago and Northwestern R.R. Co. has been disallowed and this amount has been included as dividends.

c. Commissions paid on the collection of nontaxable income have been disallowed as a deduction.

e. Capital net gain has been increased by $5,000.00, this amount representing a loss on stock of Stevenson and Cameron, Incorporated, and disallowed for lack of sufficient evidence for the determination of the loss.

Computation of tax

Net income adjusted in revenue agent's report		$515,347.71
Less:		
Capital net gain		299,942.31
Income subject to surtax		215,405.40
Less:		
Dividends	$279,493.52	
Personal exemption	1,500.00	
		280,993.52
Balance subject to normal tax		None
Surtax on $215,405.40		$34,741.08
Tax at 12½% on capital net gain of $229,942.31		37,492.79
Total tax		72,233.87
Less:		
Income tax paid at source		456.59
Total tax assessable		71,777.28
Tax previously assessed		70,767.87
Deficiency		$1,009.41

Before United States Board of Tax Appeals

[Title omitted.]

Amended answer to petition (no. 60709)

Filed Sept. 12, 1932

31 The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for amended answer to the petition of the above-named taxpayer, admits, denies, and avers as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 3.

4a & b. Denies that he erred in determining the tax set forth in said notice of deficiency and further denies that he erred as alleged in paragraphs 4(a) and 4(b) of the petition.

(c) Avers that the deficiency asserted in the notice of deficiency is understated by reason of the allowance of deductions for contributions in excess of 15% of the petitioner's "ordinary net income" before deducting contributions. Avers that in the event the Board determines that the petitioner's "ordinary net income" is less than the amount found by the Commissioner, the deductions for contributions should be limited to 15% of the "ordinary net income" before deducting contributions regardless of the amount thereof.

5. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5(a) to

5(c) inclusive, of the petition, and therefore denies the same.

32 6. The Commissioner relies on the following facts in support of the error assigned in subparagraph (c) of paragraph 4 hereof:

(a) In the notice of deficiency, the respondent determined that the petitioner's "ordinary net income" before deducting contributions was the sum of $247,571.83 and that petitioner had capital net gain in the amount of $299,942.31.

(b) In determining the "ordinary net income" set forth in the notice of deficiency in the amount of $215,405.40, the Commissioner made an allowance of $39,088.46, representing contributions claimed by petitioner.

Denies generally and specifically each and every material allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST.
C. M. CHAREST.
General Counsel,
Bureau of Internal Revenue.

Of counsel:
C. C. HOLMES,
Special Attorney,
Bureau of Internal Revenue.

33 Before United States Board of Tax Appeals

[Title omitted.]

Stipulation (no. 58391)

Filed Nov. 14, 1932

Stipulation re: 1928 income tax

It is hereby stipulated by and between Susan Dwight Bliss, the above-named petitioner, by Donald Arthur, her agent, and the Commissioner of Internal Revenue, the above-named respondent by C. M. Charest, Esq., its general counsel, for the purposes of the trial and hearing of the above-entitled proceeding before the United States Board of Tax Appeals, as follows:

First. That ordinary net income as determined in letter from the Commissioner of Internal Revenue to Susan Dwight Bliss, dated

March 10, 1931, at $228,003.74, shall be reduced by the sum of $1,508.89 by allowing as a deduction the amount of fees paid to the Trustees of the George T. Bliss Agency Account upon income from tax-exempt securities.

Second. That capital net gain as determined in said letter of March 10, 1931, at $220,305.79, shall be reduced by the sum of $8,760.97.

34 Third. That said sum of $8,760.97 represents a capital loss upon the sale of 250 shares of Quincy Mining Company stock, which is properly deductible from capital gain and which is properly computed as follows:

Original cost of petitioner of 250 shares Quincy Mining Co. stock in December, 1916	$22,500.00
Less dividends received during 1917 to 1920, inclusive, determined to have been paid out of surplus accumulated prior to March 1, 1915, $14.776 per shares, on 250 shares	3,694.00
Adjusted basis	$18,806.00
Proceeds of sale by petitioner of said 250 shares Quincy Mining Co. stock in 1928	10,045.03
Loss, as adjusted	$8,760.97

Fourth. That the amount of charitable and other contributions made by petitioner during the year 1928 of a character deductible from net income, subject to the limitations provided in section 23 subdivision (n) of the Revenue Act of 1928, was $43,995.92. That the ordinary net income of petitioner before deduction of the amount of such contributions was $270,490.77. That the capital net gain was $211,544.82. That the total amount of said charitable and other contributions was deducted from gross income by petitioner in her return upon the claim that in determining the amount

35 of 15% of petitioner's net income for the year 1928 under section 23 subdivision (n) of the Federal Revenue Act of 1928, ordinary net income and capital net gain should both be included, which contention is asserted by petitioner and denied by the Commissioner, and this stipulation shall not prejudice the rights of either petitioner or respondent as to the legality of such deduction in excess of 15% of ordinary net income.

Dated, July 5, 1932.

DONALD ARTHUR,
Agent for Petitioner.

(Signed) C. M. CHAREST,
General Counsel of Commissioner of Internal Revenue.

Before United States Board of Tax Appeals

[Title omitted.]

Stipulation (no. 60709)

Filed November 14, 1932

Stipulation re: 1929 income tax

It is hereby stipulated by and between Susan Dwight Bliss,
36 the above-named petitioner, by Donald Arthur, her agent, and the Commissioner of Internal Revenue, the above-named respondent, by C. M. Charest, Esq., its general counsel, for the purposes of the trial and hearing of the above-entitled proceeding before the United States Board of Tax Appeals, as follows:

First. That net income as determined in letter from the Commissioner of Internal Revenue to Susan Dwight Bliss, dated October 31, 1931, shall be reduced by the sum of $6,922.03 in the following particulars

(a) By allowance as a deduction of the amount of fees paid to the trustees of the George T. Bliss agency account upon income from tax-exempt securities	$1,653.93
(b) By allowance as a deduction of amount of fees paid to others in agency account	268.10
(c) By allowance as a deduction of the sum of $5,000 representing a loss on stock of Stevenson & Cameron which cost petitioner $5,000 and became worthless in year 1929	5,000.00
	$6,922.03

Second. That the amount of charitable and other contributions made by petitioner during the year 1929, of the character deductible from net income, subject to the limitations provided in section 23, subdivision (n) of the Revenue Act of 1928, was $39,088.46.
37 That the ordinary net income of petitioner before the deduction of such contributions was $247,571.83. That the capital net gain was $299,942.31. That the total amount of said charitable and other contributions was deducted from gross income by petitioner in her return upon the claim that in determining the amount of 15% of petitioner's net income for the year 1929 under section 23, subdivision (n) of the Revenue Act of 1928, ordinary net income and capital net gain should both be included, which contention is asserted by petitioner and denied by the Commissioner, and that this stipulation shall not prejudice the rights of either petitioner or respondent as to the legality of such deduction in excess of 15% of ordinary net income.

Dated, July 5, 1932.

DONALD ARTHUR,
Agent for Petitioner.
(Signed) C. M. CHAREST,
General Counsel of Commissioner of Internal Revenue.

46334—34——2

38 Before United States Board of Tax Appeals

27 B.T.A.

SUSAN DWIGHT BLISS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Docket Nos. 58391, 60709. Promulgated December 2, 1932

Deductions for charitable and other contributions allowed by section 23 (n) of the Revenue Act of 1928 are limited to an amount which does not exceed 15 per centum of the taxpayer's net income without such deductions, computed upon the basis of excluding all items of capital gain, capital loss, and capital deductions.

C. C. Holmes, Esq., for the respondent.

These are consolidated proceedings for the redetermination of deficiencies in income tax for the years 1928 and 1929 in the amounts of $1,909.31 and $1,009.41, respectively. The sole issue submitted for decision is whether or not the petitioner is entitled to deduct from gross income for each of the taxable years on account of charitable contributions an amount in excess of 15 percent of the ordinary net income computed without such deduction but less than 15 percent of the combined ordinary net income and capital net gain.

39 Findings of fact

The parties executed and filed at the hearing the following stipulations:

Taxable year 1928

First. That ordinary net income as determined in letter from the Commissioner of Internal Revenue to Susan Dwight Bliss, dated March 10, 1931, at $228,003.74, shall be reduced by the sum of $1,508.89 by allowing as a deduction the amount of fees paid to the trustees of the George T. Bliss agency account upon income from tax-exempt securities.

Second. That capital net gain as determined in said letter of March 10, 1931, at $220,305.79, shall be reduced by the sum of $8,760.97.

Third. That said sum of $8,760.97 represents a capital loss upon the sale of 250 shares of Quincy Mining Company stock, which is properly deductible from capital gain and which is properly computed as follows:

	Original cost of petitioner of 250 shares Quincy Mining Co. stock in December 1916	$22,500.00
	Less dividends received during 1917 to 1920, inclusive, determined to have been paid out of surplus accumulated prior to March 1, 1913, $14.776 per share, on 250 shares	3,694.00
	Adjusted basis	18,806.00
40	Proceeds of sale by petitioner of said 250 shares Quincy Mining Co. stock in 1928	10,045.03
	Loss, as adjusted	8,760.97

Fourth. That the amount of charitable and other contributions made by petitioner during the year 1928 of a character deductible from net income subject to the limitations provided in section 23 subdivision (n) of the Revenue Act of 1928, was $43,995.92. That the ordinary net income of petitioner before deduction of the amount of such contributions was $270,490.77. That the capital net gain was $211,544.82. That the total amount of said charitable and other contributions was deducted from gross income by petitioner in her return upon the claim that in determining the amount of 15 percent of petitioner's net income for the year 1928 under section 23, subdivision (n), of the Federal Revenue Act of 1928, ordinary net income and capital net gain should both be included, which contention is asserted by petitioner and denied by the Commissioner, and this stipulation shall not prejudice the rights of either petitioner or respondent as to the legality of such deduction in excess of 15% of ordinary net income.

Taxable year 1929

First. That net income as determined in letter from the Commissioner of Internal Revenue to Susan Dwight Bliss, dated October 31, 1931, shall be reduced by the sum of $6,922.03 in the following particulars:

41	(a) By allowance as a deduction of the amount of fees paid to the trustees of the George T. Bliss agency account upon income from tax exempt securities	$1,653.93
	(b) By allowance as a deduction of the amount of fees paid to others in agency account	268.10
	(c) By allowance as a deduction of the sum of $5,000 representing a loss on stock of Stevenson & Cameron which cost petitioner $5,000 and became worthless in the year 1929	5,000.00
		$6,922.03

Second. That the amount of charitable and other contributions made by petitioner during the year 1929 of the character deductible from net income, subject to the limitations provided in section 23, subdivision (n) of the Revenue Act of 1928, was $39,088.46. That the ordinary net income of petitioner before the deduction of such contributions was $247,571.83. That the capital net gain was $299,942.31. That the total amount of said charitable and other contri-

butions was deducted from gross income by petitioner in her return upon the claim that in determining the amount of 15% of petitioner's net income for the year 1929 under section 23, subdivision (n) of the Revenue Act of 1928, ordinary net income and capital net gain should both be included, which contention is asserted by petitioner and denied by the Commissioner, and that this stipulation shall not prejudice the rights of either petitioner or respondent as to the legality of such deduction in excess of 15% of ordinary net income.

42

Opinion

TRAMMELL: This case was submitted upon the pleadings and certain stipulations of the parties, set out above as our findings of fact. The issues presented in the original pleadings have been disposed of by said stipulations, but in an amended answer the respondent alleges that the deficiencies as originally determined by him were understated because of the allowance of deductions for contributions in excess of 15 percent of the petitioner's "ordinary net income" before deducting contributions, and asserts claim for increased deficiencies accordingly.

The petitioner claimed deductions from gross income for each of the taxable years in excess of 15 percent of her ordinary net income but in amounts less than 15 percent of her combined "ordinary net income" and "capital net gain." It is stipulated in effect that the amounts so claimed by the petitioner on account of contributions constitute allowable deductions within the purview, and subject to the limitations, of section 23 (n) of the Revenue Act of 1928, which provides that in computing "net income" there shall be allowed as deductions, among other things:

"(n) Charitable and other contributions.—In the case of an individual contributions or gifts made within the taxable year * * * to an amount which * * * does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. * * *"

43

Thus, the issue presented is whether the maximum amount which an individual may deduct for contributions in computing net income is 15 per cent of "ordinary net income", or whether such maximum deduction may include also a corresponding percentage of "capital net gain." This question involves a construction of the provisions of the statute relating to net income and capital net gains.

The Revenue Act of 1928 provides for the taxation of capital net gains as follows:

"Sec. 101. * * *

"(a) Tax in case of capital net gain. In the case of any taxpayer, other than a corporation who for any taxable year derives a capital net gain * * *, there shall, *at the election of the taxpayer*, be levied, collected, and paid, in lieu of all other taxes, imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the

manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain." [Emphasis supplied.]

It follows from the above provisions of the statute that if an individual taxpayer derives a capital net gain and elects to
44 have the tax computed at the special rate therein provided, as the petitioner in this case has done, the amount of such capital gain is excluded from gross income for the purpose of computing normal and surtaxes upon ordinary net income.

Section 21 of said act defines "net income" as meaning the gross income computed under section 22, less the deductions allowed by section 23, and the latter section provides in subsection (n) that in computing net income deductions for charitable contributions shall be allowed to an amount which does not exceed 15 percent of the taxpayer's net income computed without such deductions.

Hence, if the capital net gain has been excluded from gross income for the purpose of computing the tax thereon at the special rate provided, it cannot at the same time form a part of the basis for computing the maximum deduction allowable for contributions. On the other hand, if the taxpayer does not elect to have the capital gain taxed at the special rate, it is then included in the gross income, and the charitable deduction would be computed on the basis of the resulting net income.

This construction of the statute is further supported by the fact that section 101 (c) defines "ordinary net income" as meaning "the net income computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions." If capital gain is excluded from gross income and capital deductions are also excluded in computing "ordinary net income", it is obvious that the term "net income" as used in section 23, which furnishes the basis for computing the maximum
45 deduction for contributions, means "ordinary net income", and such deductions must be computed on the basis of net income from which all capital gain, capital loss and capital deductions have been excluded.

Again, section 101 (c) defines "capital net gain" as meaning "the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains."

Charitable contributions are not allowed as capital deductions, and cannot be used in computing maximum deductions for charitable contributions. The taxpayer cannot exclude capital gain from gross income for the purpose of getting the benefit of the lower rate of tax thereon, and at the same time include capital gain in gross income for the sole purpose of computing the maximum deduction for contributions.

In the above provisions of the statute, we think Congress has clearly and designedly limited allowable deductions for charitable

and other contributions to a maximum of 15 percent of the ordinary net income computed upon the basis of excluding all items of capital gain, capital loss and capital deductions.

The contention of the petitioner cannot be sustained. The deficiencies will be redetermined accordingly, after giving effect to the stipulations of the parties on other points, as set out in our findings of fact.

Judgment will be entered under Rule 50.

[Seal.]

46 Before United States Board of Tax Appeals, Washington

Docket Nos. 58391, 60709

SUSAN DWIGHT BLISS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to findings of fact and opinion promulgated December 2, 1932, the respondent herein, on December 29, 1932, having filed a proposed redetermination for the years 1928 and 1929, and the petitioner on January 18, 1933, having filed notice of acquiescence to the said proposed redetermination, it is

Ordered and decided, that there are deficiencies for the years 1928 and 1929 in the amounts of $1,196.87 and $15.54, respectively.

Enter:

Entered Jan. 31, 1933.

[SEAL.] (Signed) CHARLES M. TRAMMELL,
Member.

vlh

47 In United States Circuit Court of Appeals for the Second Circuit

U.S.B.T.A. Docket Nos. 58391, 60709

SUSAN DWIGHT BLISS, PETITIONER

against

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review filed March 1, 1933

To the honorable judges of the Circuit Court of Appeals for the Second Circuit:

Comes now the petitioner, Susan Dwight Bliss, and respectfully shows:

I

The petitioner on review is an individual residing at No. 9 East 68th Street, Borough of Manhattan, New York City, within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit. The respondent on review is the Acting Commissioner of Internal Revenue of the United States duly appointed and holding his office by virtue of the laws of the United States.

This petition for review is filed pursuant to the provisions
48 of section 1001 of the Revenue Act of 1926, as amended by section 1101(a) of the Revenue Act of 1932, for the review of the decision of the United States Board of Tax Appeals rendered February 2, 1933, in accordance with an opinion promulgated December 2, 1932, whereby the court found that certain deductions on account of charitable contributions were improperly included by the petitioner in determining taxes due from her for the years 1928 and 1929.

II

Facts

These are consolidated proceedings for the redetermination of alleged deficiencies in income tax for the years 1928 and 1929. They were begun by notices of deficiency sent to petitioner by respondent in the amounts of $1,909.31 and $1,009.41, respectively, for the two years based on the refusal of respondent to allow certain deductions not material to this appeal claimed by petitioner in computing her income and capital net gain for the two years in question. By amended answer to petitioner's amended petition to the United States Board of Tax Appeals for redetermination of said alleged deficiencies respondent set forth additional grounds of deficiency upon which said Board of Tax Appeals rested its decision, namely, that petitioner had claimed and been allowed deductions for charitable contributions in excess of the 15% of petitioner's net income allowed as a deduction by section 23-(n) of the Revenue Act of 1928.

49 The parties executed and filed at the hearing before said Board various stipulations of fact, of which the following excerpts are involved in this appeal:

Taxable year 1928

Fourth. That the amount of charitable and other contributions made by petitioner during the year 1928 of a character deductible from net income subject to the limitations provided in section 23 subdivision (n) of the Revenue Act of 1928, was $43,995.92. That the ordinary net income of petitioner before deduction of the amount of such contributions was $270,490.77. That the capital net gain was $211,544.82. That the total amount of said charitable and other contributions was deducted from gross income by petitioner in her

return upon the claim that in determining the amount of 15 percent of petitioner's net income for the year 1928 under section 23 subdivision (n) of the Federal Revenue Act of 1928, ordinary net income and capital net gain should both be included, which contention is asserted by petitioner and denied by the Commissioner, and this stipulation shall not prejudice the rights of either petitioner or respondent as to the legality of such deduction in excess of 15% of ordinary net income.

Taxable year 1929

Second. That the amount of charitable and other contribu-
50 tions made by petitioner during the year 1929 of the character deductible from net income, subject to the limitations provided in section 23, subdivision (n) of the Revenue Act of 1928, was $39,088.46. That the ordinary net income of petitioner before the deduction of such contributions was $247,571.83. That the capital net gain was $299,942.31. That the total amount of said charitable and other contributions was deducted from gross income by petitioner in her return upon the claim that in determining the amount of 15% of petitioner's net income for the year 1929 under section 23, subdivision (n) of the Revenue Act of 1928, ordinary net income and capital net gain should both be included, which contention is asserted by petitioner and denied by the Commissioner, and that this stipulation shall not prejudice the rights of either petitioner or respondent as to the legality of such deduction in excess of 15% of ordinary net income.

III

The nature of the controversy is such as to give rise to but one issue:

1. Was petitioner entitled to deduct from gross income for each of the taxable years on account of charitable contributions amounts in excess of 15% of the ordinary net income computed without such deductions but less than 15% of the combined ordinary net income and capital net gain.

51 IV

Your petitioner desires to obtain a review of the afore-mentioned decision of the United States Board of Tax Appeals by this honorable court.

V

Your petitioner's assignment of error is:

1. The court erred as a matter of law in excluding capital net gain of petitioner in the years 1928 and 1929 from net income in such respective years in determining the 15% limitation in excess of which the charitable contributions of petitioner for such years should not be allowed as deductions and in refusing to allow as a de-

duction in such years from net income the full amount of such charitable contributions which were not in excess of 15% of ordinary net income and capital net gain for such years without such deduction.

Wherefore, your petitioner prays a review of the action of the United States Board of Tax Appeals in this case and that said decision of said Board be reversed.

(Sgd.) SUSAN DWIGHT BLISS,
Petitioner.
(% Gould & Wilkie, One Wall Street, New York City).

52 [*Duly sworn to by Susan Dwight Bliss, jurat omitted in printing.*]

53 In United States Circuit Court of Appeals, for the Second Circuit

[Title omitted.]

Notice of filing petition for review

Filed March 31, 1933

To the Commissioner of Internal Revenue, Washington, D.C.:

You are hereby notified that the above-named petitioner did on the 1st day of March 1933, file with the Clerk of the United States Board of Tax Appeals at Washington, D.C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 1st day of March 1933.

(Signed) GOULD & WILKIE.
Attorneys for Petitioner.
Office & Post Office Address,
One Wall Street, Borough of Manhattan, New York City.

54 Personal service of the above and foregoing notice together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 1st day of March 1933.

(Signed) C. M. CHAREST.

In United States Circuit Court of Appeals, for the Second Circuit

[Title omitted.]

Praecipe for record

Filed March 31, 1933

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the Second Circuit

copies, duly certified as correct, of the following documents and records in the above-entitled cause in connection with the
55 petition for review by the said Circuit Court of Appeals for the Second Circuit heretofore filed by the petitioner, Susan Dwight Bliss:

(1) Docket entries of the proceedings before the Board.

(2) Pleadings before the Board.

As to Docket No. 58391.

(a) The petition, including annexed copy of deficiency letter.

(b) Amended petition.

(c) Amended answer to amended petition.

As to Docket No. 60709.

(a) Petition, including annexed copy of deficiency letter.

(b) Amended answer to petition.

(3) Stipulations of fact filed by counsel.

(4) Findings of fact, opinion, and decision of Board.

(5) Petition for review and assignments of error together with proof of service of notice of filing petition for review and of service of copy of petition for review.

(6) Præcipe.

Dated, March 24, 1933.

(Signed) GOULD & WILKIE,
Attorneys for Petitioner,
Office & Post Office Address,
One Wall Street, Borough of Manhattan, New York City.

Service of a copy of the within præcipe is hereby admitted the 31st day of March 1933.

(Signed) C. M. CHAREST.

56 [Clerk's certificate to foregoing transcript omitted in printing.]

57 In United States Circuit Court of Appeals for the Second Circuit

No. ——

BLISS, SUSAN DWIGHT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Motion for substitution

Comes now the above-named petitioner and moves the court that Guy T. Helvering, Commissioner of Internal Revenue, be substi-

tuted for David Burnet as respondent herein, and in support of said motion respectfully shows:

1. That the resignation of said David Burnet, who was Commissioner of Internal Revenue when the petition for review in this proceeding was filed, was duly accepted and he ceased to be such officer on May 15, 1933.

2. That Guy T. Helvering was duly appointed and confirmed as Commissioner of Internal Revenue to succeed the said David Burnet; that he qualified as such officer and entered upon the duties of said office on June 6, 1933, since which date the said Guy T. Helvering has been and now is Commissioner of Internal Revenue.

3. That there is a substantial need for continuing and maintaining this proceeding and obtaining an adjudication of the questions involved, for otherwise the order of the United States Board of Tax Appeals herein sought to be reviewed will become final and the right to have the legality thereof determined will be extinguished.

This motion is made pursuant to the provisions of sec. 11 of the act of February 13, 1925 (c. 229, 43 Stat. 941) (U.S.C., title 28, sec. 780).

GOULD & WILKIE,
Attorney for Petitioner.

DATED JUNE 7, 1933.

The undersigned, attorney for Guy T. Helvering, Commissioner of Internal Revenue, hereby expressly consents to the substitution sought by the above motion.

SEWALL KEY,
Special Assistant to the Attorney General,
Attorney for Guy T. Helvering,
Commissioner of Internal Revenue.

57a In United States Circuit Court of Appeals

Order of substitution

Upon motion of the petitioner, expressly consented to by Guy T. Helvering, Commissioner of Internal Revenue, it is hereby ordered that said Guy T. Helvering, as such officer, be and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

WM. PARKIN, *Clerk.*

DATED JULY 15, 1933.

58 In United States Circuit Court of Appeals for the Second Circuit

No. 31—October Term, 1933

Argued December 20, 1933. Decided January 8, 1934

SUSAN DWIGHT BLISS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals.

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

The taxpayer filed a petition for review of an order of the Board redetermining deficiencies in income taxes for the years 1928 and 1929 in the amounts of $1,196.87 and $15.54 respectively. Order reversed.

For the opinion below, see 27 B.T.A. 205.

Gould & Wilkie, of New York City (R. L. Von Bernuth and John F. Boyer, both of New York City, of counsel), for petitioner.

Sewall Key and J. P. Jackson, Sp. Assts. to Atty. Gen., for respondent.

Carlyle E. Yates, of New York City, amicus curiæ.

Opinion

SWAN, Circuit Judge.

But one question is presented, and that is common to both taxable years. It will suffice, therefore, to state the facts with reference to 1928 only. During that year the taxpayer made charitable contributions in the amount of $43,995.92, which she claims the right to deduct from gross income under section 23 (n) of the Revenue Act of 1928 (45 Stat. 801; 26 U.S.C.A., § 2023 (n)). This permits a deduction not exceeding "15 per centum of the taxpayer's net income as computed without the benefit of this subsection." Her "net income" for the year, as defined by section 21, and without any deduction for charitable contributions, was nearly half a million dollars and included an item of $211,544.82 "capital net gain", upon which she elected to be taxed at the 12½ percent rate under section 101 (a), 45 Stat. 811 (26 U.S.C.A., § 2101 (a)). If this item may properly be included in net income to compute the 15 percent allowance as a deduction for charitable contributions, the taxpayer was entitled to deduct the full amount of her charitable gifts and no deficiency exists; but if, as the Commissioner contends and as the Board held, it may not be so included, then her duduction was limited to $40,573.62 and the deficiency order was correct. Stated abstractly the question is whether, if a taxpayer elects to be taxed under section 101 (a) of the Revenue Act of 1928 (26 U.S.C.A.,

§ 2101 (a)), capital net gain may be included in his net income when computing the 15 percent deduction allowable for charitable contributions under section 23 (n).

This question has been decided in favor of the taxpayer in two District Court cases. Atkins v. White (3 F.Supp. 694 (D.Mass.)); Blow v. United States (D.C.N.D. Ill.; — F.Supp. —), decided September 1, 1933. It was decided adversely to the taxpayer by three different divisions of the Board of Tax Appeals, including the proceeding here sought to be reviewed. (Harbison v. Com'r (26 B.T.A. 896); Bliss v. Com'r (27 B.T.A. 205); Colgate v. Com'r (27 B.T.A. 506).) Compare, Elkins v. Com'r (24 B.T.A. 572); Livingood v. Com'r (25 B.T.A. 585). Subsequently, however, the question was reviewed by the entire Board, and its position was
59 completely reversed. (Straus v. Com'r (27 B.T.A. 1116.).

This opinion has been adhered to in Robinette v. Com'r (28 B.T.A. —), and Igleheart v. Com'r (28 B.T.A. —). From each of the foregoing decisions we are told that the losing party has taken an appeal, but none of the appeals has yet been decided.

The provision permitting a deduction from gross income of charitable contributions to the extent of 15 percent of the net income computed without the benefit of this deduction was introduced into the income tax law by section 1201 (2) of the Revenue Act of 1917 (40 Stat. 330). Its obvious purpose was to encourage gifts for charity, education, and science (Cong. Rec., September 7, 1917, p. 5728). It has been continued in substantially the same form in each successive revenue act. In the Revenue Act of 1921, § 206, the provision for taxing "capital net gain" at a rate different from that applied to income from other sources first appears (42 Stat. 232). The reasons for this enactment are concisely stated in Burnet v. Harmel (287 U.S. 103, 106; 53 S.Ct. 74; 77 L.E. 199). The provision appears in the 1928 act as section 101. Paragraph (a) thereof provides that an individual taxpayer who derives a "capital net gain", as defined in paragraph (c), may, at his election, have his tax determined as follows: "A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain." Paragraph (b) provides for determining the tax when an individual taxpayer sustains a "capital net loss"; a partial tax is computed as in paragraph (a) and from this amount 12½ per centum of the capital net loss is deducted to arrive at the total tax. Since the "partial tax" is first to be computed upon the basis of the "ordinary net income", we turn to section 101 (c) (7), 26 U.S.C.A., § 2101 (c) (7), for a definition of that phrase: "(7) 'Ordinary net income' means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductons." In the construction of this definition lies the controversy. The taxpayer contends that "net income, computed in accordance

with the provisions of this title", requires computation according to sections 21, 22, and 23 (26 U.S.C.A., §§ 2021–2023), and that from the computation thus made there are then "excluded", that is, stricken out or disregarded, all items of capital gain, capital loss, and capital deductions; that the figures remaining give "ordinary net income" and the figures excluded give "capital net gain." The commissioner, on the other hand, asserts that clause (7) should be read as though it directed net income to be computed "after excluding from the computation all items of capital gain, capital loss, and capital deductions.

It is to be noted that the phrase "ordinary net income" occurs in both paragraph (a), which deals with the case of capital net gain, and paragraph (b), which deals with the case of capital net loss. It must have the same meaning in each. A construction favorable to the taxpayer in the former will operate to his detriment in the latter, and vice versa. Hence the canon of strict construction invoked by the commissioner on the theory that the taxpayer is claiming the benefit of an exemption seems inapplicable. We can hardly say that there is any plain advantage to be gained by taxpayers from one construction rather than the other; it depends on whether in the long run cases of capital net gain involve larger sums than cases of capital net loss. Canons of interpretation aside, it seems to us that merely as a matter of verbal construction the meaning contended for by the petitioner is the more reasonable and the more compatible with the purpose of the statute. There is nothing in section 101 which expressly indicates that the taxpayer was intended to lose any part of the deductions allowed by section 23 when his tax is determined according to the rates provided in section 101. Paragraphs (a) and (b) deal with computation of the tax rather than with computation of taxable income; the usual rates are applied, "as if this section had not been enacted", to that part of the taxable income called "ordinary net income" and the special 12½ percent rate to "capital net gain" or "capital net loss." Paragraph (c) defines the terms used in the earlier paragraphs. It does not indicate an intention to modify the definitions of "net" and "gross" income contained in sections 21 and 22 (26 U.S.C.A., §§ 2021, 2022), nor to change the deductions allowed by section 23 (26 U.S.C.A., § 2023). On the contrary, clauses (3) and (4) of section 101 indicate that they are to remain unchanged. They divide such deductions into "capital deductions" and "ordinary deductions." The latter mean "the deductions allowed by section 23 other than capital losses and capital deductions." Clause (5) defining "capital net gain" makes it necessary to determine
60 whether "ordinary deductions" exceed "gross income computed without including capital gains." We do not understand this to be a direction that in computing "ordinary deductions" gross income is to be decreased by the exclusion of capital gains. It means to us that ordinary deductions are to be figured in the ordinary way and then compared with "gross income computed without including

capital gain" to see if they exceed it. If this be the correct construction, there is harmony between clause (5) and clause (7), and "net income" computed in accordance with sections 21, 22, and 23 is composed of two parts, "ordinary net income" and "capital net gain", to which respectively the appropriate rates may be applied as provided in paragraph (a).

This was the view of the Bureau of Internal Revenue for many years. On February 6, 1923, the Deputy Commissioner telegraphed in response to an inquiry: "Contributions; 15% limitation; Capital net gains: fifteen percent limitation for deductions account charitable contributions applies to total net income inclusive of gain from sale of capital assets" (C.C.H. Fed. Income Tax Service, 1924, par. 2033). In 1924 a corresponding ruling as to capital losses was made: "Capital losses cannot be excluded in computing net income for the purpose of determining the amount of charitable contribution deductions" (I.T. 404, Cum. Bul. III–2, p. 152). In 1928 the Government argued before this court that section 206 of the Revenue Act of 1921 (42 Stat. 232) (corresponding to section 101 of the 1928 act (26 U.S.C.A., § 2101)) related merely to rates and did not affect the computation of the allowance of charitable deductions, and we by dictum approved this construction (Sadowsky v. Anderson (C.C.A.) (29 F. (2d) 677, 679)). In November 1931 the Board of Tax Appeals decided Elkins v. Com'r (24 B.T.A. 572), and held, contrary to the ruling of the Bureau, that capital losses should be disregarded in computing the 15 percent deduction for charitable contributions. The Commissioner announced that this decision was "contrary to the position which the Bureau has consistently followed", and would be appealed (Int. Rev. Bul. XI–7, 5386; Mim. 3931). But when the decision in Harbison v. Com'r (26 B.T.A. 896) was announced in August 1932 the Commissioner withdrew his determination to appeal the Elkins case and acquiesced in the Harbison decision (Int. Rev. Bul. XI–49, 5896; Mim. 3986). The consistent administrative rulings of the Commissioner from 1923 to 1932, during which time the provisions in question were thrice reenacted, may properly be given weight by the courts (Brewster v. Gage (280 U.S. 327, 336; 50 S.Ct. 115; 74 L.Ed. 457)). We do not think that the Commissioner's subsequent about face renders the principle inapplicable. It is not a case where the administrative ruling was ambiguous, as in Burnet v. Chicago Portrait Co. (285 U.S. 1, 21; 52 S.Ct. 275; 76 L.Ed. 587).

In our opinion the taxpayer was entitled to the deduction claimed, and no deficiency in taxes existed.

The order is reversed.

L. HAND, Circuit Judge, dissents with opinion.

61 In United States Circuit Court of Appeals for the Second Circuit

No. 31. October term, 1933

Argued December 20, 1933. Decided January 8, 1934

SUSAN DWIGHT BLISS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals.
Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

Dissenting opinion

L. HAND, Circuit Judge (dissenting).

In spite of the contrary ruling for nine years in the Treasury and its very belated change of front, it appears to me that the intent is too plain for latitude of interpretation, though of course in view of the difference of opinion that has arisen I cannot feel as sure as I should, if the matter had come before me first. Section 23 (n) (2), 26 U.S.C.A., § 2023 (n) (2), puts a limit upon charitable gifts of "15 per centum of the taxpayer's net income as computed without the benefit of this subsection"; so that in first computing the net income all charitable gifts must be omitted. That gives a net income, but only tentatively; all charitable gifts may be then deducted until they reach the prescribed limit, which is 15 percent of the net income, already provisionally computed. Thus the final taxable income is computed in two steps. If that be so, it appears to me that section 101 (c) (7), 26 U.S.C.A., § 2101 (c) (7), becomes plain. The "ordinary net income" there defined is to be "computed in accordance with the provisions of this title", which as regards charitable gifts means that the limit must be fixed on a tentative net income. However, it is to be so computed only after excluding certain items; and "excluding" seems to me necessarily to relate to the first computation. It would be very unreal to suppose that it referred to the deduction of items not "excluded" but once included in the provisional computation; that after they had been included, and 15 percent of the result deducted, the same items should be reversed; the gains subtracted and the losses added. That is not "excluding" them from the computation; "excluding" means dealing with them once and for all. But if it is possible to suppose that they were to affect the computation at all, the more natural way was to use the definitions in (c), subd. (5) and subd. (6), 26 U.S.C.A., § 2101 (c) (5, 7), which had just been made; "capital net gain" would be subtracted from, or "capital net loss" added to, the net income. The definition would then have read: "'Ordinary net income' means net income computed in accordance with the provisions of this title after

deducting 'capital net gain' or adding 'capital net loss.'" I think that the Board was right.

62 In United States Circuit Court of Appeals, Second Circuit

SUSAN DWIGHT BLISS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment filed Jan. 15, 1934

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is reversed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

63 [File endorsement omitted.]

64 [Clerk's certificate to foregoing transcript omitted in printing.]

46334—34——3

U.S. GOVERNMENT PRINTING OFFICE: 1934

32 Supreme Court of the United States

Order allowing certiorari

Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.